

Tong Sek Ee (P) v Ho Shu Joon & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02
(IM)-2210-10 OF 2018

AHMADI ASNAWI, ABDUL KARIM AND NOR BEE ARIFFIN JJCA

18 DECEMBER 2020

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Family Law — Children — Change of child's surname — Child's name registered using mother's surname — Respondent applied to change child's surname to his — Whether respondent estopped from raising issue of surname — Births and Deaths Registration Act 1957 s 13A(1)

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Words and Phrases — 'Ordinarily' — Surname of legitimate child — Child's name registered using mother's surname — Respondent applied to change child's surname to his — Whether s 13A(1) of Births and Deaths Registration Act 1957 precluded appellant from registering child's name using her surname — Births and Deaths Registration Act 1957 s 13A(1)

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The appellant and the respondent were married in 2013. The appellant filed a divorce petition on 21 January 2016, about four days after she gave birth to their second child ('TJH'). The divorce petition showed that she and the respondent had lived separately since September 2015. She alleged that her husband had committed adultery with the second respondent. When TJH was born, the appellant registered her son's name using her surname. Their marriage was dissolved pursuant to a decree nisi by consent where the parties had agreed on matters pertaining to the custody, care and control of the children, maintenance, access and division of property. Their son's name spelt out in the decree nisi was TJH. Approximately a year later, the respondent filed an application to vary the terms of his access to his children ('encl 20'). This was followed by another application ('encl 25') pursuant to s 13A of the Births and Deaths Registration Act 1957 ('the Act') for an order to have his son's surname changed from 'Tong' ('TJH') to his surname 'Ho' ('HJH'). The two applications were heard together by the learned judicial commissioner ('JC'). Her Ladyship granted both applications in favour of the respondent. The appellant appealed against both decisions in encl 25 ('Appeal No 2210') and encl 20 ('Appeal No 2211'). The decision of the learned JC was assailed essentially on the grounds that the learned JC: (a) wrongly construed s 13A(1) of the Act; (b) failed to appreciate the respondent had agreed not to raise the issue on the change of surname and was estopped from doing the same; and (c) erred in holding that the court was entitled to exercise its function as *parens patriae* and in taking into account issues that were not raised in granting the respondent's application.

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A Held, dismissing Appeal No 2211 and allowing Appeal No 2210:

- B** (1) The language in s 13A(1) of the Act was plain, unambiguous and explicit and admitted to one meaning only, that was, if the child was a legitimate child, ordinarily the surname of the father may be entered. In other words, while the surname of a legitimate child was ordinarily derived from the father, the surname could also be derived from the mother. The word ‘ordinarily’ was an ordinary word which should be given its natural and ordinary meaning. From the dictionary definitions of the word ‘ordinarily’, what s 13A(1) of the Act simply meant was that usually or normally or in the normal course of event, the child’s surname should derive from his father. Accordingly, TJH’s name should have been HJH when his name was first registered with the National Registration Department. But at the same time, s 13A(1) of the Act did not preclude the appellant from registering TJH’s name using her surname. The ambit of s 13A(1) of the Act was wide enough to allow the parents to exchange or abrogate or relinquish their rights (see paras 17 & 25–27).
- E** (2) Even though the appellant’s action in registering TJH’s name did not seem to be in conformity with the express provision of s 13A(1) of the Act, the respondent’s subsequent conduct gave a clear, unqualified indication of his intention to relinquish his right on the use of his surname. TJH was ten months old when the decree nisi was granted by the court on 16 November 2018. TJH’s name and his identity card number and the provision on maintenance of TJH and the respondent’s access to the children were all clearly spelt out in the decree nisi. The respondent knew then that his son did not carry his surname (see paras 35–36).
- G** (3) The learned JC was plainly in error when failing to give sufficient judicial appreciation on the issue of estoppel raised by the appellant. The respondent was estopped from revisiting the issue on the surname. The respondent who was fully conversant and conscious of his rights under s 13A(1) of the Act, had agreed to relinquish his right to raise the issue of surname in the future in exchange of not having to pay maintenance for the appellant and not having to pay for the tertiary education cost of their son. The respondent filed the application in encl 25 when he decided to have a change of mind. The respondent could not approbate and reprobate. The decree nisi was a decree by consent properly entered into by the parties. The law on the effect of a consent order was trite. The respondent was bound by his agreement on his son’s surname (see paras 39–41).
- I** (4) It was wrong for the learned JC to decide on the rights of TJH, no matter how strongly she felt about it, without giving the parents the opportunity to be heard. If the learned JC was convinced that in the best interest of TJH, it was crucial for the court to assume the parental role, that finding

could only be made after having heard the parties, and certainly not before or without hearing them. As the right of TJH seemed to be the overriding factor in allowing the application, the learned JC was plainly erroneous in arriving at her finding (see para 46).

[Bahasa Malaysia summary]

Perayu dan responden telah berkahwin pada tahun 2013. Perayu mengemukakan petisyen perceraian pada 21 Januari 2016, kira-kira empat hari selepas dia melahirkan anak kedua mereka ('TJH'). Petisyen perceraian menunjukkan bahawa dia dan responden telah hidup berasingan sejak September 2015. Dia mendakwa bahawa suaminya telah berzina dengan responden kedua. Apabila TJH dilahirkan, perayu mendaftarkan nama anaknya dengan nama keluarganya. Perkahwinan mereka dibubarkan berdasarkan dikri nisi melalui persetujuan di mana pihak-pihak telah menyetujui hal-hal yang berkaitan dengan hak asuhan, penjagaan dan kawalan anak-anak, nafkah, akses dan pembahagian harta. Nama anak lelaki mereka yang dinyatakan dalam keputusan tersebut adalah TJH. Kira-kira setahun kemudian, responden mengemukakan permohonan untuk mengubah syarat aksesnya kepada anak-anaknya ('lampiran 20'). Ini diikuti oleh satu lagi permohonan ('lampiran 25') menurut s 13A Akta Pendaftaran Kelahiran dan Kematian 1957 ('Akta') untuk perintah agar nama keluarga anaknya ditukar daripada 'Tong' ('TJH') menjadi nama keluarganya 'Ho' ('HJH'). Kedua-dua permohonan itu didengar bersama oleh pesuruhjaya kehakiman ('JC') yang bijaksana. Yang Arif membenarkan kedua-dua permohonan yang memihak kepada responden. Perayu merayu terhadap kedua-dua keputusan tersebut dalam lampiran 25 ('Rayuan No 2210') dan lampiran 20 ('Rayuan No 2211'). Keputusan JC yang bijaksana dibidas pada asasnya dengan alasan bahawa JC yang bijaksana: (a) salah menafsirkan s 13A(1) Akta; (b) gagal menilai responden telah bersetuju untuk tidak membangkitkan isu mengenai perubahan nama keluarga dan dihalang daripada melakukan perkara yang sama; dan (c) terkhilaf dalam memutuskan bahawa mahkamah berhak menjalankan fungsinya sebagai *parens patriae* dan dengan mempertimbangkan isu-isu yang tidak dibangkitkan dalam pemberian permohonan responden.

Diputuskan, menolak Rayuan No 2211 dan membenarkan Rayuan No 2210:

- (1) Bahasa dalam s 13A(1) Akta adalah nyata, jelas dan eksplisit dan diakui satu makna sahaja, iaitu, jika anak itu adalah anak yang sah, biasanya nama keluarga bapa boleh dimasukkan. Dengan kata lain, sementara nama keluarga anak yang sah biasanya berasal dari ayah, nama keluarga juga boleh berasal dari ibu. Perkataan 'biasa' adalah kata biasa yang harus diberi makna semula jadi dan biasa. Daripada definisi kamus perkataan 'biasa', maksud s 13A(1) Akta adalah bahawa lazimnya atau kebanyakannya atau dalam keadaan biasa, nama keluarga anak itu berasal daripada ayahnya. Oleh itu, nama TJH seharusnya HJH ketika namanya

- A pertama kali didaftarkan di Jabatan Pendaftaran Negara. Tetapi pada masa yang sama, s 13A(1) Akta tidak menghalang perayu untuk mendaftarkan nama TJH menggunakan nama keluarga. Skop s 13A(1) Akta cukup luas untuk membolehkan ibu bapa menukar atau membatalkan atau melepaskan hak mereka (lihat perenggan 17 & 25–27).
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- (2) Walaupun tindakan perayu dalam mendaftarkan nama TJH sepertinya tidak dalam keselarasan dengan peruntukan yang jelas dalam s 13A(1) Akta, tindakan lanjut responden memberikan petunjuk yang jelas dan langsung mengenai niatnya untuk melepaskan haknya atas penggunaan nama keluarganya. TJH berumur sepuluh bulan ketika dikri nisi diberikan oleh mahkamah pada 16 November 2018. Nama TJH dan nombor kad pengenalannya serta peruntukan mengenai nafkah TJH dan akses responden kepada anak-anak semuanya dinyatakan dengan jelas dalam dikri nisi. Responden mengetahui ketika itu bahawa anaknya tidak mempunyai nama keluarganya (lihat perenggan 35–36).
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- (3) JC yang bijaksana jelas salah ketika gagal memberikan penghargaan kehakiman yang mencukupi mengenai isu estoppel yang dibangkitkan oleh perayu. Responden dihalang daripada menyemak semula isu nama keluarga. Responden yang benar-benar fasih dan sedar akan haknya di bawah s 13A(1) Akta, telah bersetuju untuk melepaskan haknya untuk membangkitkan isu nama keluarga pada masa akan datang sebagai pertukaran untuk tidak perlu membayar nafkah untuk perayu dan tidak perlu membayar kos pendidikan tinggi anak lelaki mereka. Responden memfailkan permohonan di lampiran 25 ketika dia memutuskan untuk melakukan perubahan fikiran. Responden tidak boleh menerima dan menolak. Dikri nisi adalah dikri melalui persetujuan yang dimeterai oleh pihak-pihak. Undang-undang mengenai kesan perintah persetujuan adalah rendah hati. Responden terikat dengan persetujuannya mengenai nama keluarga anaknya (lihat perenggan 39–41).
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- (4) Adalah salah bagi JC yang bijaksana untuk memutuskan hak TJH, tidak peduli seberapa kuat perasaannya terhadapnya, tanpa memberi peluang kepada ibu bapanya untuk didengar. Sekiranya JC yang bijaksana yakin bahawa demi kepentingan TJH, adalah mustahak bagi mahkamah untuk memikul peranan ibu bapa, dapatan itu hanya dapat dibuat setelah mendengar pihak-pihak, dan tentu saja tidak sebelum atau tanpa mendengarnya. Oleh kerana hak TJH sepertinya menjadi faktor utama dalam membenarkan permohonan itu, JC yang bijaksana jelas salah ketika mencapai dapatan (lihat perenggan 46).]

Cases referred to

A Child & Ors v Jabatan Pendaftaran Negara & Ors [2017] 4 MLJ 440; [2017] 7 CLJ 533, CA (refd)

- Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, SC (refd) A
- Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
- Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206, CA (refd) B
- Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145, FC (refd)
- Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor; intervener)* [2020] 2 MLJ 277, FC (refd)
- Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 CLJ 209, FC (refd) C
- PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417, CA (refd)
- Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430, FC (folld) D

Legislation referred to

Births and Deaths Registration Act 1957 ss 7, 8, 13A, 13A(1), (2), 15

Appeal from: Divorce Petition No WA-33-43-01 of 2016 (High Court, Kuala Lumpur) E

Balbir Singh (Zakiah Zaki with him) (Najiana Wan Balbir) for the appellant. Ravi Nekoo (Parvinder Kaur with him) (Hakem Arabi & Assoc) for the respondent. F

Nor Bee Ariffin JCA:

INTRODUCTION

[1] This appeal raises an important issue on the construction of s 13A(1) of the Births and Deaths Registration Act 1957 (Act 299) regarding the right of the parents to the use of surname in the case of a legitimate child. G

[2] The child in this case is the second child of the appellant and the respondent. His name carries his mother's surname. His elder sister HEV, uses the surname of the father. H

[3] The appellant and the respondent were married on 30 March 2013. HEV was born on 30 October 2013, TJH on 17 January 2016. The parties initially filed a joint petition to dissolve the marriage on 10 September 2015 in Kuantan High Court but the joint petition was withdrawn. The appellant subsequently filed the divorce petition dated 12 January 2016 in Kuala Lumpur High Court on 21 January 2016, about four days after she gave birth to TJH. The divorce petition showed that she and the respondent had lived I

A separately since September 2015. She alleged that that her husband has committed adultery with the second respondent.

[4] When TJH was born, the appellant registered her son's name using her
B surname.

[5] Their marriage was dissolved pursuant to the decree nisi dated
16 November 2016. TJH then was about ten months old. It was a decree by
consent where the parties had agreed on matters pertaining to the custody, care
and control of the children, maintenance, access and division of property.
C Their son's name spelt out in the decree nisi was TJH.

[6] Approximately a year later, on 31 October 2017, the respondent filed an
application to vary the terms of his access to his children ('encl 20'). This was
followed by another application filed on 9 January 2018 ('encl 25') for an order
to have his son's surname changed from 'Tong' (TJH) to his surname 'Ho'
(HJH). The two applications were heard together by the learned judicial
commissioner (JC, as Her Ladyship then was). Her Ladyship granted both
applications in favour of the respondent on 24 September 2018. The appellant
E appealed against both decisions in Appeals No 2210 ('encl 25') and No 2211
('encl 20').

[7] We heard the two appeals together. We unanimously dismissed Appeal
No 2211 and allowed Appeal No 2210. This judgment relates only to Appeal
F No 2210.

ENCLOSURE 25

[8] The learned JC had withheld the names of the children to the marriage
G in her grounds of judgment ('GOJ'). We shall do the same.

[9] In this application, the respondent sought the following order:
1. Bahawa Pempetisyen dan Respondent Pertama hadir di pejabat Jabatan
H Pendaftaran Negara dalam masa 7 hari dari tarikh Perintah ini untuk menukar
nama anak bernama TJH kepada HJH.

[10] The respondent made this application pursuant to s 13A of the Births
and Deaths Registration Act 1957 (Act 299).
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[11] The affidavits filed in this application showed the following.

[12] The respondent claimed that his daughter's name was in accordance
with the provisions of s 13A(1) of Act 299 where the surname 'Ho' was used,

but not his son. In essence, the respondent's case is that the appellant had without his knowledge, registered the surname of their son as 'Tong' being the appellant's surname instead of the respondent's surname which is 'Ho'. As a legitimate child, TJH's surname should be that of the father as provided for under s 13A(1) of Act 299 and what the appellant had done was contrary to the provisions of the law.

[13] The appellant claimed that the respondent is estopped from raising the issue of surname as the respondent had agreed to relinquish his right to raise the same in the future, in exchange for not having to pay maintenance for the appellant and not having to bear the tertiary education cost of their son. This was reflected in the draft consent order dated 4 October 2016 marked as exh 'T1'. Both parties have agreed for the name in the decree nisi to be read as 'TJH'.

[14] The respondent in the affidavit in reply responded that exh 'T1' is inadmissible as it was a document used in the negotiation discussion. If he had agreed to such term, it would have been reflected in the decree nisi but there was no such term. The names of the children were used based on their birth certificates. In any event, the respondent claimed that there cannot be any settlement reached between the parties which contravenes the law as the law must be complied with.

GROUNDS OF APPEAL

[15] The decision of the learned JC was assailed essentially on these grounds:

- (a) that the learned JC had wrongly construed the provisions of s 13A(1) of Act 229;
- (b) that the learned JC had erred in failing to appreciate that in the draft consent order in exh 'T1', the respondent had agreed not to raise the issue on the change of the surname and that the respondent is estopped from raising the same; and
- (c) that the learned JC erred in holding that the court is entitled to exercise its function as *parens patriae* and she has taken into account issues not raised in the case in granting the respondent's application.

OUR DECISION

[16] Section 13A of Act 299 is a provision on surname and it reads:

13A Surname of child

- (1) The surname, if any, to be entered in respect of a legitimate child shall ordinarily be the surname, if any, of the father.

- A (2) The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided that where the person acknowledging himself to be the father of the child in accordance with section 13 requests so, the surname may be the surname of that person.
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- C [17] In the present appeal, we are only concerned with s 13A(1). There is no doubt with regard to the express language used in s 13A(1) of Act 299 (see the decision of the Court of Appeal in the case of *A Child & Ors v Jabatan Pendaftaran Negara & Ors* [2017] 4 MLJ 440; [2017] 7 CLJ 533). The language in s 13A(1) of Act 299 is plain, unambiguous and explicit and admits to one meaning only, that is, if the child is a legitimate child, ordinarily the surname of the father may be entered (see also the decision of the Federal Court in *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)* [2020] 2 MLJ 277 — on appeal from the decision in *A Child and Ors*). In other words, while the surname of a legitimate child is ordinarily derived from the father, the surname can also be derived from the mother.
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- E [18] The definition of ‘surname’ in s 13A of Act 299 was canvassed by the Court of Appeal in the case of *A Child & Ors* (see also the decision of the Federal Court in *Jabatan Pendaftaran Negara & Ors*).
- F [19] The surname is not an issue here. Unlike the complexity of the legal issues in the case of *A Child & Ors* (and also in *Jabatan Pendaftaran Negara*) which involved the construction of s 13A(2), the issue in the appeal before us is straight forward. Both parties are of Chinese race, they have their surnames and TJH is their legitimate son. The dispute is simply over whose surname shall prevail in the circumstances and as the surname of their son was registered
- G using the appellant’s surname, whether the appellant has failed to comply with the law.
- H [20] The learned JC did not opine, and we think correctly, that the surname must be that of the father. This is shown from the passage in the grounds of judgment (‘GOJ’):
- I [29] To my mind, if R1 had indeed agreed not to pursue the change of surname of the second child, this should have been clearly stated as one of the terms in the said Decree Nisi, especially in light of an express provision in the form of section 13A BDRA 1957. The absence of such a term in the said Decree Nisi take this case out of the category where a consent order is sought to be altered and thus arguments on estoppel can, and have indeed been, raised by the Petitioner.
- [21] The respondent’s affidavits seemed to suggest that he premised his discontentment with the appellant on two grounds. Firstly, the words used in

the affidavit in support ‘tidak mengikuti peruntukan s 13A Akta Pendaftaran Kelahiran dan Kematian 1957’ (see para 9) connote an act of non-compliance. Secondly, the words ‘tidak boleh adanya sebarang persetujuan yang bertentangan dengan undang-undang negara dan akta ini perlu dipatuhi’ in his affidavit in reply (see para 6) connote an act in contravention of the law. We do not however intend to delve further on the second contention because at the hearing before us, learned counsel for the respondent conceded that s 13A(1) of Act 299 did not take away the mother’s right to name the child using her surname. It is the first contention that is the key issue in this appeal.

[22] The learned JC granted the application in encl 25 for two reasons. The first was because the court took into account the right of TJH (which we shall advert to later in this judgment) and the second reason was these:

[33] Furthermore, although learned counsel for the petitioner submitted that the usage of the words ‘shall ordinarily’ gives way to specific agreement to the contrary between the parties, no case law was cited on the implementation of the words ‘shall ordinarily be’ in the context of s 13A of the BDRA 1957 and I have also not been able to find any judgment which has elucidated on this point.

[34] Under the circumstances, I am not convinced that this is a case that is exceptional or out of the ordinary such that R1’s application should be denied nor one where estoppel lies to defeat the same.

[23] It is apparent from the above passages that the learned JC was rather hesitant to agree with learned counsel for the appellant that the words ‘shall ordinarily’ allow parties to make specific agreement to the contrary because there was no decided case that had construed the meaning of the words ‘shall ordinarily’ in the context of s 13A(1) and also because she was unable to find any judgment which has canvassed this point. Her Ladyship did not consider it necessary to make a finding on the effect of the word ‘ordinarily’.

[24] By reason of the respondent’s insistence to displace the surname of the appellant, we say that Her Ladyship is called upon to interpret the word ‘ordinarily’. Had she done so as a starting point, she would agree with learned counsel for the appellant that the presence of the word ‘ordinarily’ allows the parties to make specific agreement to the contrary. With the definition in mind, we are of the view that the learned JC would have proceeded to give sufficient judicial appreciation to the facts and circumstances of the case in deliberating over the application, and to take relevant things for consideration and leave aside what is not relevant.

[25] The word ‘ordinarily’ is an ordinary word which should be given its natural and ordinary meaning. The word does not carry any special meaning or attribute. We have looked at several dictionaries on the definition of the word ‘ordinarily’ as shown below:

- A (a) AS Hornby, *Oxford Advance Learner's Dictionary* (8th Ed), Oxford University Press, 2010 at p 1036:
- ‘Ordinarily’ means: 1 ‘a normal way’, synonymous to ‘normally’, 2 Used to say what normally happens in a particular situation especially when something different happening is happening this time, synonymous to ‘usually’;
- B (b) *Cambridge Dictionary* defines ‘ordinarily’ as ‘usually’ which synonymous to ‘commonly’ and ‘normally’ (see <https://dictionary.cambridge.org/dictionary/english/ordinarily>);
- C (c) *Merriam-Webster* defines ‘ordinarily’ as ‘in an ordinary manner or to an ordinary extent: such as ‘in the ordinary course of events’, ‘to the usual extent’, or ‘in a commonplace or inferior way’ (see <https://www.merriam-webster.com/dictionary/ordinarily#h1>); and
- D (d) *Collins English Dictionary* defines the word ‘ordinarily’ as ‘in ordinary, normal, or usual practice; usually; normally’, ‘usually; as a rule,’ or ‘in an ordinary manner or to an ordinary degree’ (see <https://www.collinsdictionary.com/dictionary/english/ordinarily>).
- E [26] From the above dictionary definitions of the word ‘ordinarily’, what s 13A(1) of Act 299 simply means is that usually or normally or in the normal course of event, the child’s surname should derive from his father. Accordingly, TJH’s name should have been HJH when his name was first registered with the National Registration Department. But at the same time, s 13A(1) of Act 299
- F does not preclude the appellant from registering TJH’s name using her surname. Learned counsel for the respondent submitted that to claim the right to use her surname, the appellant must come within the ambit of the law and say why the surname should not be of the father.
- G [27] It is obvious that if the word ‘ordinarily’ is absent from s 13A(1) of Act 299, the child’s surname must solely be that of the father. But when that is not the case and when deliberately the term ‘ordinarily’ is incorporated in the statute, it is made clear that the intention of the Parliament is to allow some flexibility in the use of the surname as the words of the statute speaks the
- H intention of the Legislature (see *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 CLJ 209). The ambit of s 13A(1) of Act 299, in our view, is wide enough to allow the parents to exchange or abrogate or relinquish their rights. One clear example is when, prior to the registration, the parents reach an agreement for the mother’s surname to be
- I used instead of the father. Another example is, even if the registration of the child’s name bears the mother’s surname, the father has abrogated or relinquished the use of his surname. We say that the law conceptualises such situations to arise. This is the reason why the law does not impose any sanction if the mother does not conform to its express provisions.

[28] Section 13A(1) of Act 299 does not contain words to the effect that if the surname is not that of the father, the mother has to offer reason or say why the surname should not be the father (as submitted by learned counsel for the appellant). We however acknowledge that when the appellant has departed, so to speak, from the express provision of s 13A(1) of Act 299, there ought to be a basis or reason for such action. Otherwise, we are not giving effect to the word 'shall ordinarily'. The legislative intent would be rendered meaningless if the mother is not constrained in any manner to register her child's name using her surname. Thus, whether a mother has brought herself within the ambit of the law would be dependent on the relevant inferences to be drawn from all facts and circumstances of the particular case. The learned JC in our view did canvass the facts and circumstances when she remarked that she was 'not convinced that this is a case that is exceptional or out of the ordinary such that R1's application should be denied nor one where estoppel lies to defeat the same'. But we think she has misdirected herself as to the facts and the law and hence, our appellate intervention is necessary.

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[29] In our view, the factual matrix and the circumstances of this case amply demonstrate why the appellant's action in registering TJH's name is in order and does not fly in the face of the law. From her affidavit in reply, we can safely conclude that the appellant did not dispute that the surname should be the surname of the respondent but she resisted the application because she claimed that the respondent had, in the course of their negotiations to amicably reach a settlement with regard to the divorce petition, relinquished his rights.

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[30] At the High Court, contrary to the contention of the respondent that exh 'T1' was inadmissible, the learned JC accepted it. She gave it her due consideration but only to subsequently reject it because Her Ladyship opined that exh 'T1' carried limited weight since there was no signature of the appellant and respondent as well as their respective counsels to support to the appellant's submission that the respondent now seeks to approbate and reprobate. The learned JC was wrong, in our view, not to give appropriate consideration to exh 'T1' on that reason alone because the respondent has never disputed that exh 'T1' was a draft consent order that relate to their divorce proceedings. He only objected to the admissibility of the draft, the objection of which was overruled by the learned JC. The respondent had accepted that decision and he can no longer maintain the argument before us on the inadmissibility of exh 'T1'.

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[31] Even if exh 'T1' is not to be taken into consideration, the decree nisi itself is telling. There is no dispute as to the correctness of the content of the decree nisi. It is common ground that the decree nisi was the result of several negotiations that went on between the parties to finally dissolve their marriage and their matrimonial disputes. By necessary implication, that would include

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A the parents' right to the surname for TJH, the respondent being fully conversant and conscious of his rights to his son's surname.

[32] In the joint petition signed by both parties, para 7 (at p 38 of the records of appeal ('RR')) reads:

B 7. Pempetisyen Isteri pada tarikh petisyen ini telah mengandung selama 5 bulan dan dijangkakan bersalin pada penghujung bulan Januari 2016.

C Paragraph (c), (e) and (f) of the joint petition showed that the custody, care and control of the HEV and the child the appellant was pregnant with would be given to her, that she will pay for the maintenance of the children and she did not ask maintenance for herself (see p 39 RR).

D [33] In the divorce petition at para 4, the appellant pleaded that she was pregnant with their second child and due to deliver the baby in mid January 2016 (the divorce petition was dated 12 January 2016 and filed on 21 January 2016). The respondent has admitted to the content of para 4.

E [34] Thus, the respondent was well apprised of the arrival of his second child. There was no dispute that the respondent was nowhere to be seen when the appellant gave birth to their son and when she needed to register the child's name before the expiration of a period of 60 days from the date of birth of TJH as required by s 8 of Act 299. It was also not disputed that the respondent and the appellant were living apart when TJH was born. The learned JC had made
F a mention in her GOJ on the alleged abandonment of the appellant and TJH during the period of TJH's birth. The appellant being a qualified informant to give information concerning the birth of TJH by virtue of s 7 of Act 299, proceeded to register her son's name. Instead of using the respondent's
G surname, she registered her surname. Despite no interest shown to his newly born son, the respondent claimed that the appellant had done wrong in registering her surname without his knowledge and he now insists on his right as the father.

H [35] We have considered the facts in totality. In our view, even though the appellant's action in registering TJH's name does not seem to be in conformity with the express provision of s 13A(1) of Act 299, the respondent's subsequent conduct gives a clear, unqualified indication of his intention to relinquish his right on the use of his surname. Our reasons are as follows.

I [36] TJH was ten months old when the decree nisi was granted by the court on 16 November 2018. TJH's name and his identity card number 160117-06-0617 and the provision on maintenance of TJH and the respondent's access to the children were all clearly spelt out in the decree nisi. The respondent knew then that his son does not carry his surname.

[37] If the learned JC had given some weight to exh 'T1', and if we are to look at exh 'T1' which was the draft consent order that was prepared by the respondent's solicitors, there is para 3.b.iv (see p 140 *RR*) which reads — 'Pempetisyen akan mengambil langkah-langkah dalam masa satu bulan dari tarikh perintah untuk menukar nama keluarga anak lelaki dari T kepada H'. The excerpt showed that the respondent was exerting his right. The appellant said she did not agree to that para 3.b.iv and had it cancelled. It is significant to note that in the decree nisi, the content of this para 3.b.iv is not there. An irresistible conclusion to be drawn is that the respondent had agreed to drop his term. Section 15 of Act 299 permits the name of a child by which it is registered to be altered before the expiration of one year from the date of the birth of the child. The respondent cannot feign ignorant of the law. He was represented by solicitors and as we had mentioned earlier, exh 'T1' was a draft prepared by his solicitors. Thus, if indeed the respondent was persistent in changing his son's surname, he could have done so as TJH was ten months old then. Exhibit 'T1' showed that he had wanted to but the decree nisi showed that the subject matter was not pursued.

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[38] Even if again, we are not to look at exh 'T1', the respondent's argument that if he had indeed agreed to relinquish his right, it would have been reflected in the decree nisi, is untenable. If he is persistent in the position taken that TJH's name should have used his surname, he ought to have made his reservation, or registered his objection or have the words to the same effect incorporated in the decree nisi in order to assert, protect, reserve and preserve his right on his surname. Instead of doing what is expected of him to cement his rights, he not only failed to ensure there is a term in the decree nisi to safeguard his right but he allowed TJH's name to be incorporated in the decree nisi. In this context, when he without any reservation or qualification allowed his son's name which carry his mother's surname to be mentioned in the decree nisi, nothing turns on any of his argument in his affidavits. His argument that the reference to the children's names was simply based on their identity cards is totally unconvincing and merely an afterthought.

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[39] The learned JC in our view was plainly in error when she failed to give sufficient judicial appreciation on the issue of estoppel raised by the appellant. We agree with learned counsel for the appellant that the respondent is estopped from revisiting the issue on the surname (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, *Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206).

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A [40] Given the facts and the circumstances in this case, it is obvious that the terms in the decree nisi reflected a compromise between the appellant and the respondent, namely, the respondent who is fully conversant and conscious of his rights under s 13A(1) of Act 299, had agreed to relinquish his right to raise the issue of surname in the future in exchange of not having to pay maintenance for the appellant and not having to pay for the tertiary education cost of their son. The respondent filed the application in encl 25 when he decided to have a change of mind. It is settled law that the respondent cannot approbate and reprobate (*PB Securities Sdn Bhd v Autoways Holding Bhd* [2000] 4 MLJ 417).

C [41] The decree nisi is a decree by consent properly entered into by the parties. The law on the effect of a consent order is trite. The respondent is bound by his agreement on his son's surname. Learned counsel for the appellant submitted, citing the Federal Court case of *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145, that the only possible way in which a consent order can be altered is by the consent of all parties. In this present case, there is no consent by the appellant, therefore the appellant said the respondent's application cannot succeed. It was further submitted that another reason why the respondent should not succeed is because there is no provision in the law to cater for the order he has sought.

D [42] That brings us to another point to highlight. Learned counsel for the appellant contended that the order dated 24 September 2018 granted pursuant to the application in encl 25 is fraught with uncertainty as to its execution. We find there is basis for this argument. Although the application relates to the use of surname as envisaged by s 13A of Act 299, and since s 15 of Act 299 is of no assistance to him as TJH has almost attained the age of two years old when the respondent had decided to file encl 25 on 9 January 2018, it is incumbent on the respondent to specify the relevant provision of Act 299 or any regulations made thereunder or any law for that matter, that he is relying on in proceeding with his application. It is pertinent to note that even his counsel admitted that he was uncertain as to the procedure applicable vis a vis the execution of the order.

H [43] We shall now address the issue of *parens patriae*. In this regard, the learned JC decided to assume the parental role as she was deeply concerned with the rights of TJH and the stigmatisation the child may suffer from in the years to come, if he continue to maintain the surname of his mother. The learned JC said:

I [30] However, having said that, I am of the view that there is an even more critical factor that requires the attention of this court in exercising its function as *parens patriae* (see *Mahabir Prasad v Mahabir Prasad* [1981] 2 MLJ 326 and *W v H* [1987] 2 MLJ 235). Section 24 of the Courts of Judicature Act 1964 (Act 91) provides the

civil jurisdiction of the High Court in the following terms:

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[31] It is notable that the submissions by counsels centred on the rights of the parents, their conduct and the agreement that they have entered between them. Unfortunately, in the warring factions between father and mother, which is the norm in family disputes, the most important aspect was not given any weight and that is the rights of TJH.

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[32] The fact that R1 is the biological father of TJH is undisputed. If the surname of TJH is maintained as it is, ie with the surname 'Tong' aspersions may be cast upon the second child as being an illegitimate child since sub-s 13A(2) of the BDRA 1957 provides that 'The surname, if any, to be entered in respect of an illegitimate child may be where the mother is the informant and volunteers the information, be the surname of the mother ...' TJH has an elder sister who carries the surname 'Ho'. In due time, both children will begin to wonder and question the differences between their surnames. The petitioner should be mindful of the repercussions of the position that she had taken in resisting this application in encl 25. As much as the parents despise each other in the days and months leading to their divorce and as they go by their separate ways, the venom should not be allowed to manifest in a manner that will have negative impact on the children, especially TJH. An innocent child like TJH should not be stigmatised just because the petitioner begrudges R1 for the alleged abandonment of the petitioner and TJH during the period of TJH's birth.

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[44] Learned counsel for the appellant submitted that the learned JC had gone on her own frolic in highlighting TJH's purported stigmatisation as the right of the child was never an issue before the court and the parties were not invited to address the matter. Learned counsel for the respondent, while admitting that TJH's right was not an issue before the court, submitted that the learned JC was correct and should be commended for taking into consideration the problems TJH may face in the future if his surname is left as it is.

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[45] In addressing this issue, we can do no better than taking guidance from the observations made by Zaki Tun Azmi CJ in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 at pp 302–303; [2009] 6 CLJ 430 at pp 437–438 as shown from the passages below:

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[14] The nature of our system is adversarial. This means that the judge has to listen to submissions or cases put by each party to an action. He then decides the case based on evidence and submissions put by both parties. In a criminal case, the prosecution has to prove their case beyond reasonable doubt while the defence's burden is merely to raise a doubt. In civil cases however, the burden placed on both parties is equally balanced. The successful party is the one that is able to prove to the court on the balance of probability that his case is more probable. That is on facts. The claimant has to plead his case in the statement of claim while the defendant pleads in his statement of defence. In short, both parties are aware of the other

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- A party's case. In fact, both parties would know the facts but also the documents, if any, that are going to be relied upon by his opposite party.
- [15] The facts pleaded will inadvertently be related to the legal principles that the party will be relying upon. It is not for the court to decide on what principle a party should plead. It should be left to the parties to identify it themselves (see *Tan Kong Min v Malaysia National Insurance Sdn Bhd*; *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* and *Janagi v Ong Boon Kiat*).
- B [16] The court also decides a case after considering the evidence adduced by each party and documents produced by them. Neither party should be taken by surprise. Even in respect of law, whether it is the court at first instance or the appellate court, judges rely heavily on the submissions put forward by the respective counsel. A good counsel is one who produces authorities to support the statement of law he is relying upon. The authorities can be in the form of reported judgments, text books or even published law articles. In fact, according to etiquette, he is supposed to even bring to the attention of the court authorities which favour his opponent's case. Of course
- C in such an instance, he would then distinguish the facts of the case before the court to the case in the authority. It is therefore dangerous and totally inadvisable, for the court, on its own accord, to consider any point without reliance on any pleadings or submission by counsel appearing before them. If the learned judge thinks there are any points which are relevant to the case before him and which was not raised by
- D either party, it is his duty to highlight that to the parties before him. He must then give an opportunity for both parties to further submit on that particular point. There have been instances where a judge may already form some opinion on certain issues, legal or otherwise, but after hearing submissions and views expressed by a party, he may conclude differently.
- E [17] The effect of a judge making a decision on an issue not based on the pleadings and without hearing the parties on that particular issue would be in breach of the *latin maxim audi alteram partem*, which literally means, to hear the other side, a basic principle of natural justice.
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- G [46] We think it is wrong for the learned JC to decide on the right of TJH, no matter how strongly she felt about it, without giving the parents the opportunity to be heard. More so in this case where the learned JC commented that the appellant should be mindful of the repercussions on her son in resisting this application. This inevitably leaves an adverse impression that the appellant
- H was not being thoughtful of her son's future well being when she chose to oppose the application. In our view, if the learned JC is convinced that in the best interest of TJH, it is crucial for the court to assume the parental role, that finding can only be made after having heard the parties, and certainly not before or without hearing them. As the right of TJH seemed to be the overriding factor in allowing the application, it is our view that the learned JC
- I is plainly erroneous in her arriving at her finding.

[47] We set aside the order dated 24 September 2018. We made an order that the parties are to bear their own costs.

Appeal No 2211 dismissed and Appeal No 2210 allowed.

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Reported by Nabilah Syahida Abdullah Salleh

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